Supreme Court, U. S.
FILED
DEC 4 1975
MICHAEL RODAK, JR., CLERK

No. 75-414

In the Supreme Court of the United States

OCTOBER TERM, 1975

THOMPSON VAN LINES, INC., ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

"Tacking" is the practice of combining separate motor common carrier certificates that share a com-

mon point, or "gateway," in order to perform a through transportation service, via the "gateway," from points authorized in one certificate to points authorized in the other. Some certificates of public convenience and necessity expressly permit tacking and others expressly prohibit it. When a certificate neither permits nor prohibits tacking, the Commission in the past has permitted the practice. Since the Commission did not find that the public convenience and necessity required through service via the gateway, the provision of such service was left to the carrier's option. When the certificate expressly permits tacking, the provision of such service is mandatory.

While some gateway operations resulted in relatively direct through service, others involved circuitous routings, with a concomitant waste of fuel and loss of efficiency of service. In 1952 the Commission announced criteria by which a carrier conducting substantial operations through a gateway could obtain a certificate authorizing direct service (*Childress —Elimination Sanford Gateway*, 61 M.C.C. 421).[1] Many carriers, however, continued to conduct circuitous operations through gateways, and with the advent of the fuel crisis in 1973 the Commission instituted a rulemaking proceeding to determine whether, or to what extent, tacking served the public interest.

[1] Under *Childress* a carrier can obtain direct authority by showing that substantial operations are being conducted between the points involved over the "gateway" route, that it is already an active competitor for traffic between those points, and that the direct authority would not result in service materially different from that already available.

After receiving the views of hundreds of interested parties, including carriers and shippers, the Commission adopted new rules governing gateway operations.[2] The new rules provide that after June 4, 1974, no carrier may tack two or more certificate authorities where the total origin-to-destination distance through the gateway route is more than 300 miles, unless an application for direct service between the two points is filed with or approved by the Commission. See 119 M.C.C. 530. These new rules apply only to motor common carriers holding irregular route certificates which neither expressly permit nor prohibit tacking.

On review, the three-judge district court unanimously sustained the Commission's decision,[3] noting that "the agency was fair and thorough in its reevaluation of its * * * gateway elimination rule" and that "the rule is in the public convenience and necessity" (J.S. App. 11a). The court rejected appellants' argument "that the right to tack constitutes a part of each carrier's certificate" (J.S. App. 9a). Tacking had merely been "permitted as a matter of general

[2] The proceeding was conducted in accordance with the requirements of Section 4 of the Administrative Procedure Act, 5 U.S.C. 553.

[3] The court denied appellants' motion for a temporary restraining order (381 F. Supp. 184) and, after full consideration, dismissed the complaint (J.S. App. 1a-14a, 15a-16a; 399 F. Supp. 1131).

ICC policy" (*ibid.*) and "constitutes a right of the carriers * * * only so long as the general Commission policy continues" (J.A. App. 10a). The court concluded that even if tacking were "such a part of a carrier's certificate that its curtailment effected an amendment or revocation of certificates" (J.S. App. 11a), the rules should still be upheld since "the proposed rule was applicable to an entire class of certificate holders" and there was no showing of "how an adjudicatory hearing would have better protected" the rights of any individual carrier (J.S. App. 12a).

ARGUMENT

The decision below is correct, and appellants have presented no issue warranting plenary consideration by the Court.

1. Appellants contend that the Commission lacked authority to promulgate the rules because the rules "amend" individual certificates. Such "amendments," appellants argue, can be achieved only by individual adjudicatory hearings. But the district court rejected the foundation of appellants' argument, holding that authorization to tack can be regarded as "a part of each carrier's certificate" only "where the Commission expressly has found that tacking was required by the public convenience and necessity" (J.S. App. 9a). Tacking in those instances is not affected by the new rules.[4] Where tacking authority is not specifically conferred in a certificate, it exists only by virtue of Commission policy. A change in that policy may affect carrier operations, but it does not amend the certificate.

[4] The Commission recognized (119 M.C.C. at 201, n. 14) that "where a certificate expressly authorizes joining, no action could be taken to eliminate that right without following the revocation procedures of section 212 of the act."

The provision of the Interstate Commerce Act that requires adjudicatory hearings to amend certificates therefore, is inapplicable. The Commission's decision to proceed by rulemaking is supported by Section 208(a) of the Interstate Commerce Act, as amended, 49 Stat. 552 (49 U.S.C. 308(a)), which authorizes the Commission to attach "reasonable terms, conditions, and limitations" to the exercise of the privileges granted by the certificate, either at the time of issuance or "from time to time thereafter." Cf. *Regular Common Carrier Conference* v. *United States*, 307 F. Supp. 941 (D. D.C.).

2. The district court also correctly concluded that the Commission's rules are valid even if they could be considered to amend existing certificates (J.S. App. 12a). This Court has consistently held that an agency may adopt rules of general applicability and future effect without holding adjudicatory hearings, even if the rules require changes in the operations of the parties affected. See, *e.g.*, *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192; *Federal Power Commission* v. *Texaco, Inc.*, 377 U.S. 33. The Commission's use of rulemaking to establish a policy of industry-wide applicability was within its discretion.

National Labor Relations Board v. *Bell Aerospace Co.*, 416 U.S. 267. Rulemaking was especially appropriate here because the issues concerned general policy rather than evidentiary facts relating to a particular party (J.S. App. 12a).[5] See *American Airlines, Inc.* v. *Civil Aeronautics Board*, 359 F.2d 624 (C.A.D.C.) (*en banc*), certiorari denied, 385 U.S. 843; *National Petroleum Refiners Association* v. *Federal Trade Commission*, 482 F.2d 672 (C.A.D.C.).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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DECEMBER 1975.

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[5] Appellants concede that "if the Commission had authority to enact the challenged Rules then the substantial evidence of record supported their adoption" (J.S. 5).

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